

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MIKEL PLETT,

Plaintiff,

v.

S. FOSTER and WALLARD,

Defendants.

Case No. 1:22-cv-01261-ADA-HBK (PC)

FINDINGS AND RECOMMENDATION TO  
DISMISS ACTION WITHOUT PREJUDICE<sup>1</sup>

14-DAY DEADLINE

Plaintiff Mikel Plett is a state prisoner proceeding pro se and *in forma pauperis* in this civil rights action. For the reasons set forth below, the undersigned recommends that the District Court dismiss this action without prejudice for Plaintiff's failure to comply with a court order and prosecute this action.

**BACKGROUND**

Plaintiff initiated this action by filing a civil rights complaint under 42 U.S.C. § 1983. (Doc. No. 1, "Complaint"). On June 29, 2023, pursuant to 28 U.S.C. § 1915A the Court issued a screening order finding the Complaint failed to state a federal claim against any Defendant. (*See generally* Doc. No. 12). Plaintiff timely filed a first amended complaint ("FAC") on July 13, 2023. (Doc. No. 13). On October 4, 2023, the Court screened the FAC and found it failed to

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<sup>1</sup> This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

1 state a claim. (*See* Doc. No. 16). The Court afforded Plaintiff three options to exercise no later  
 2 than November 3, 2023: (1) file an amended complaint; (2) file a notice that he intends to stand  
 3 on the FAC subject to the undersigned recommending the district court dismiss for reasons stated  
 4 in the October 4, 2023 Screening Order; or (3) file a notice to voluntarily dismiss this action,  
 5 without prejudice, under Federal Rule of Civil Procedure 41(a)(1) because no defendant had yet  
 6 been served. (*Id.* at 6-7). Plaintiff was required to deliver his response to the Court's Screening  
 7 Order to correctional officials for mailing no later than November 3, 2023. (*Id.* at 7 ¶ 1).

8 The Court expressly warned Plaintiff that if he "fails to timely respond to this Court Order  
 9 or seek an extension of time to comply" the undersigned "will recommend that the district court  
 10 dismiss this case as a sanction for Plaintiff's failure to comply with a court order and prosecute  
 11 this action." (*Id.* ¶ 2). As of the date of this of this Findings and Recommendation, Plaintiff has  
 12 failed to exercise any of the three options from the Court's Screening Order, or request an  
 13 extension of time to comply, and the time to do so has expired.<sup>2</sup> (*See* docket.)

#### 14 APPLICABLE LAW AND ANALYSIS

##### 15 A. Legal Standard

16 Federal Rule of Civil Procedure 41(b) permits the court to involuntarily dismiss an action  
 17 when a litigant fails to prosecute an action or fails to comply with other Rules or with a court  
 18 order. *See Fed. R. Civ. P. 41(b); see Applied Underwriters v. Lichtenegger*, 913 F.3d 884, 889  
 19 (9th Cir. 2019) (citations omitted). Similarly, this Court's Local Rules, which correspond with  
 20 Federal Rule of Civil Procedure 11, provide, "[f]ailure of counsel or of a party to comply with . . .  
 21 any order of the Court may be grounds for the imposition by the Court of any and all sanctions  
 22 . . . within the inherent power of the Court." E.D. Cal. L.R. 110. "District courts have inherent  
 23 power to control their dockets" and, in exercising that power, may impose sanctions, including  
 24 dismissal of an action. *Thompson v. Housing Auth., City of Los Angeles*, 782 F.2d 829, 831 (9th  
 25 Cir. 1986). A court may dismiss an action based on a party's failure to prosecute an action, obey  
 26 a court order, or comply with local rules. *See, e.g., Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61

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27  
 28 <sup>2</sup> As of the date of these Findings and Recommendation, 17 days have passed from the date Plaintiff was to deliver  
 his response to correctional officials for mailing, providing sufficient time for mailing.

1 (9th Cir. 1992) (dismissal for failure to comply with a court order to amend a complaint); *Malone*  
2 v. U.S. Postal Service, 833 F.2d 128, 130-31 (9th Cir. 1987) (dismissal for failure to comply with  
3 a court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure  
4 to prosecute and to comply with local rules). In determining whether to dismiss an action, the  
5 Court must consider the following factors: (1) the public’s interest in expeditious resolution of  
6 litigation; (2) the Court’s need to manage its docket; (3) the risk of prejudice to the defendants;  
7 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less  
8 drastic sanctions. *Henderson*, 779 F.2d at 1423; *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir.  
9 1988).

10           **B. Analysis**

11           After considering each of the above-stated factors, the undersigned concludes dismissal  
12 without prejudice is warranted in this case. As to the first factor, the expeditious resolution of  
13 litigation is deemed to be in the public interest, satisfying the first factor. *Yourish v. California*  
14 *Amplifier*, 191 F.3d 983, 990-91 (9th Cir. 1999).

15           Turning to the second factor, this Court’s need to efficiently manage its docket cannot be  
16 overstated. This Court has “one of the heaviest caseloads in the nation,” and due to the delay in  
17 filling judicial vacancies, which was further exacerbated by the COVID-19 pandemic, operates  
18 under a declared judicial emergency. *See Amended Standing Order in Light of Ongoing Judicial*  
19 *Emergency in the Eastern District of California*. This Court’s time is better spent on its other  
20 matters than needlessly consumed managing a case with a recalcitrant litigant. The Court cannot  
21 effectively manage its docket when a litigant ceases to litigate his/her case or respond to a court  
22 order. Thus, the Court finds that the second factor weighs in favor of dismissal.

23           Delays inevitably have the inherent risk that evidence will become stale or witnesses’  
24 memories will fade or be unavailable and can prejudice a defendant, thereby satisfying the third  
25 factor. *See Sibron v. New York*, 392 U.S. 40, 57 (1968). Thus, the third factor—risk of prejudice  
26 to defendant—weighs in favor of dismissal since a presumption of injury arises from the  
27 unreasonable delay in prosecuting an action. *Anderson v. Air W.*, 542 F.2d 522, 524 (9th Cir.  
28 1976). Because Plaintiff’s inaction amounts to an unreasonable delay in prosecuting this action,

1 the third factor weighs in favor of dismissal.

2       The fourth factor usually weighs against dismissal because public policy favors the  
3 disposition of cases on the merits. *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002).  
4 However, “this factor lends little support to a party whose responsibility it is to move a case  
5 toward disposition on the merits but whose conduct impedes progress in that direction,” which is  
6 the case here. *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217,  
7 1228 (9th Cir. 2006) (citation omitted). Indeed, “trial courts do not have time to waste on  
8 multiple failures by aspiring litigants to follow the rules and requirements of our courts.”  
9 *Pagtalunan*, 291 F.3d at 644 (Trott, J., concurring in affirmation of district court’s involuntary  
10 dismissal with prejudice of habeas petition where petitioner failed to timely respond to court  
11 order and noting “the weight of the docket-managing factor depends upon the size and load of the  
12 docket, and those in the best position to know what that is are our beleaguered trial judges.”).  
13 Further, as set forth in the Screening Order, the Court already determined that the Complaint, as  
14 pled, failed to state a claim, so this factor does not weigh in favor of the Plaintiff.

15       Finally, the Court’s warning to a party that failure to obey the court’s order will result in  
16 dismissal satisfies the “considerations of the alternatives” requirement. *Ferdik*, 963 F.2d at 1262;  
17 *Malone*, 833 F.2d at 132-33; *Henderson*, 779 F.2d at 1424. The Court’s October 4, 2023 Order  
18 expressly warned Plaintiff that his failure to comply with the Court’s order would result in a  
19 recommendation for dismissal of this action. (Doc. 16 at 7 ¶ 2). Thus, Plaintiff had adequate  
20 warning that dismissal could result from his noncompliance. And the instant dismissal is a  
21 dismissal *without* prejudice, which is a lesser sanction than a dismissal with prejudice, thereby  
22 satisfying the fifth factor.

23       After considering the factors set forth *supra* and binding case law, the undersigned  
24 recommends dismissal, without prejudice, under Fed. R. Civ. P. 41(b) and Local Rule 110.

25       Accordingly, it is hereby **RECOMMENDED:**

26       This action be DISMISSED without prejudice for Plaintiff’s failure to obey court orders  
27 and failure to prosecute.

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## NOTICE

2 These Findings and Recommendations will be submitted to the United States District  
3 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
4 of the date of service of these Findings and Recommendations, a party may file written objections  
5 with the Court. The document should be captioned, “Objections to Magistrate Judge’s Findings  
6 and Recommendations.” A party’s failure to file objections within the specified time may result in  
7 waiver of his rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing  
8 *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

Dated: November 20, 2023

Helena M. Barch-Kuchta  
HELENA M. BARCH-KUCHTA  
UNITED STATES MAGISTRATE JUDGE